JD–29–98
Danville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

L & B CONSTRUCTION CO. INC.

and Case 25–CA–24253

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION LOCAL UNION NO. 20,
a/w SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION

Michael T. Beck, Esq.,
for the General Counsel.
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of Carmel, Indiana, for the Respondent.
Michael E. Van Gordon,
for the Union.

DECISION

Statement of the Case

William G. Kocol, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on January 8, 1998. The charge and amended charge were filed October 4, 1995, and October 29, 1996, respectively; and the complaint was issued October 31, 1996. The complaint alleges that L & B Construction Co. Inc. (Respondent) violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities, creating the impression that the employees' union activities were under surveillance, and impliedly threatening employees with discharge if they engaged in union activities. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire or consider for hire applicants Tyrone Moore, Ronnie Sims, Peter Williams, and Bobby Wright on April 5, 1995,[1] and by discharging employee Gabriel Brooking on May 2. Respondent filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charge and amended charge and jurisdiction; it denied the substantive allegations of the complaint. At the hearing, Respondent amended its answer to admit the allegations of the complaint concerning interstate commerce and labor organization status, and it also admitted that the individuals named in the complaint were its agents as well as supervisors within the meaning of the Act. At the hearing the General Counsel put Respondent on notice that he would be arguing that Respondent also violated the Act by refusing to hire the named discriminatees on certain specified dates after April 5.

[1] Unless otherwise indicated, all dates are in 1995.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel,[2] I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, is engaged in the business of gutter installation at its facility in Danville, Indiana, where it annually purchases and receives goods valued in excess of $50,000 from enterprises which receive those goods directly from points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Background*

As indicated above, the complaint alleges that Respondent refused to hire four employee-applicants, and then fired a fifth employee, all in violation of the Act. Respondent contends that it failed to hire the four applicants because they lacked experience and that the fifth person was not fired but instead quit his employment.

Respondent is engaged in the business of residential gutter and siding installation. Approximately 90 percent of its business involves gutter installation. Duane Lane is Respondent's president; he is in charge of the day-to-day operations of the business and he also works as an installer. Respondent employs a small but varying number of persons in its office and a varying number of installers, although it appears that the average number of installers employed is about six or eight. Respondent experiences a high degree of turnover among the installers. For example, as of Christmas 1997, one installer had worked for Respondent for a year and the remaining installers had worked for Respondent about 3 months. As another example, during the year 1995, Respondent maintained a work force of about 8 installers, but it hired and employed about 42 different persons during the course of the year. Due to such turnover, for the most part whenever an experienced gutter installer applies for work with Respondent and is not a former employee of Respondent, that applicant is hired by Respondent. Lane did, however, admit that Respondent has hired inexperienced employees who were then trained to perform gutter installation.

Lane operates the business out of his residence. At least until recently Lane's wife, who is not trained in office skills, nonetheless handled the paperwork involved in the business. Lane himself is able to read, but he is unable to do so with a high degree of proficiency. Respondent's hiring practices seem consistent with the relatively small size of the business and

[2] Briefs were due February 5, 1998. On February 12, I received Respondent's brief. It was sent via Fed Ex on February 11. The brief itself is dated February 9; attached are certificates of service that indicate it was mailed to me and counsel for General Counsel on February 9 and on the remaining parties on February 11. Since Respondent's brief is not timely nor has Respondent supplied a good reason to excuse the late filing, I do not consider Respondent's brief.

high turnover rate. Often written applications are not required as employees may be hired on the spot during an encounter between the applicant and Lane while Lane is working in the field. At the trial in this case Respondent was able to produce only eight applications for employment pursuant to the General Counsel subpoena; the applications for the five alleged discriminatees and three others. There is no evidence that Respondent uses the applications to reconsider applicants for employment after they have initially not been hired, or that Respondent has otherwise called an applicant to inquire whether the applicant was still available for work even though the applicant was not hired at the time of the initial application. To the contrary, Lane's unrebutted testimony is that Respondent does not do so.

Turning specifically to the time in question in this case, Respondent's payroll record shows that 10 persons, including Lane and Respondent's co-owner Robert Bowman, worked for Respondent for the week ending April 29. One of the remaining eight employees - Josh Campbell - had been hired by Respondent without first having gutter installation experience.

B. The Four Applicants are not Hired

On April 2,, Respondent ran an advertisement in employment section of the *Indianapolis Star* and the *Indianapolis News* that read in pertinent part: "GUTTER/SIDING Exp'd installers." The ad gave a telephone number to call but it did not identify the employer. In response to this ad the Union first sent four persons and then a fifth person to apply for a position with Respondent. At the time of his application, Tyrone Moore had about 6 years of experience working for an employer that did HVAC installation and fabrication of sheet metal duct, but he did not have any specific gutter installation experience. Ronnie Sims had about 10 years' experience working for an employer that did industrial ventilation work and siding work; he did not have any specific gutter installation experience. Peter Williams had about 5 years' experience doing roofing, duct and metal work; he had no experience doing gutter installation. Bob Wright had about 5 years' experience working for an employer that did roofing and sheet metal work; Wright did have gutter installation experience with that employer.

All four applicants were union members who had completed the Union's 5-year apprenticeship program. This involved classroom training in matters such as heating and air conditioning and welding, and included subjects such as English composition. The program also included classroom training, but no hands on experience, in gutter installation. The employees continued to be employed by their employer during this portion of the apprenticeship program. Another part of the training program included having the apprentices work directly for the Union for a 6-month period in the "Youth to Youth Program." This program employed the apprentices as organizers for the Union; they would attempt to get hired as employees of nonunion employers and then attempt to organize the employees of those employers.

Sims and Wright went together to Respondent's facility to respond to the advertisement. They were each wearing black and red caps that had a patch that bore the insignia and name of Local 20, Sheet Metal Workers; the patch was about 3 inches long. Sims and Wright each filled out applications. The application required the applicants to provide information such as the applicant's name, address, and telephone number, the position they were applying for, their education, former employers, and references. On his application Sims indicated that he was applying for the position of "Gutter or siding + helper." Under the section on the application for former employers Sims wrote "Sheet Metal Worker No. 20;" the last portion of the quoted words were written much smaller as Sims obviously tried to fit all the words in the small space given on the application. Sims also indicated on the application that he was employed by that employer as an "organizer," that he was still employed by that employer, and that he had left his previous employer "to organize." Under the section of the application concerning education,

Sims wrote that he had attended "Sheet Metal Apprentice School." Nothing on Sims' application gave any indication that he had specific gutter or siding installation experience. Wright also indicated on his application that he had been employed by "Sheet Metal Workers Local 20" and that he had left his former employer "to organize." Wright's application revealed that he was seeking the position of "gutter installation," but there was nothing on the face of the application to indicate that he had specific gutter or siding installation experience. Lane reviewed the applications and then told Sims what the entry level pay would be and that he would call Sims if he decided to hire Sims; Lane did not ask any questions about Sims' experience installing gutters or siding. Lane told Wright that he would check out other applicants and give them a call later that week. Thus, although Wright in fact had gutter installation experience, he neither disclosed this fact to Respondent on the face of his application nor during his interview with Lane.[3] Neither Wright nor Sims were contacted by Respondent.[4]

While Sims and Wright were at the Respondent's facility Moore and Williams arrived together. They were also wearing the same union cap described above. Thus, at that point there were four applicants in Respondent's facility and all were wearing the same hat. On his application in the section pertaining to former employers, Moore wrote "S.M.W. Local #20," that he occupied the position of "organizer," and that he was currently employed by that employer. Moore also indicated on the application form that he had worked for another employer as an apprentice and had left that employer for "organizing." Moore gave no specific indication on the application that he had experience in either siding or gutter installation, but he did indicate that he was seeking a position with Respondent as a helper. Williams indicated on his application that he was still working for "Sheet Metal Workers #20" as an "organizer" and that he had left his prior employer to work for "Local #20." Williams' application indicated that he was applying for the position of "installer or layout"; however, there was no specific indication on the application that Williams was experienced in gutter or siding installation. Lane reviewed the applications and then asked Williams if he had any gutter installation experience, and Williams answered that he did not have such experience working for a company but that he did do some guttering work with his father and brother for family members. Lane did not ask Moore any questions about his gutter installation experience. Lane was "very pleasant" and expressed surprise that suddenly he had so many applicants that day. Lane told Moore and Williams that he would get back to them; Moore and Williams then left. They were never contacted by Respondent.[5]

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[3] The facts concerning Wright's conversation with Lane are taken from the written report of the incident that Wright filled out that same day. Wright's testimony at trial was more detailed and to some degree inconsistent with that earlier report. Also, if Wright were seriously responding to an advertisement for experienced gutter installers, it seems he would have highlighted his experience in his application, which he did not do, rather than wait to advise Respondent of that fact during the interview, which he claims he did. I conclude, based on demeanor and the inherent probabilities, that Wright's testimony at trial was less credible than his earlier written report.

[4] Wright testified that he thereafter contacted Respondent by telephone, but he was unable to identify who he spoke with. In the absence of more specific evidence to establish Respondent's agency, that conversation is hearsay and I do not consider it for the truth of the matter asserted.

[5] Except as indicated above concerning the testimony of Wright, these facts are based on the credible testimony of the four applicants and the written summaries they made at the time concerning these events. Lane testified that he did not recall the specific details of these interviews.

Moore credibly testified that after he was denied employment with Respondent he did gutter installation work and that it took him a "couple of hours" to learn gutter installation. Gabriel Brooking, an alleged discriminatee who is a journeyman sheet metal worker, has about 7 years' experience in roofing and metal work; this experience includes the installation of gutters. Brooking credibly testified that installing gutters involves draining water out of the gutter, the new gutters are hung with hangers, a downspout is installed, and endcaps are put in place. If the gutter goes around a corner, a miter is put in place. He also credibly testified that the skills he learned as a sheet metal worker are the same skills required to install siding. Lane admitted that sheet metal workers such as the four applicants have the ability to read a tape measure, read blueprints, cut miters, rig ladders and scaffolds, and use hammers, snips, levels, drill holders, screw guns, roll forming machines, and caulking guns, but then he later testified that he did not know what skills a sheet metal worker had. In response to my question whether someone with those skills would be able to install gutters, Lane answered "Yes. I would say that you would be able to hang gutters. I mean, do it for a living, no." He analogized to being able to drive a car and being a race car driver. He explained that speed and efficiency are necessary for the gutter installer and Respondent to make money, and that is why he hires experienced installers. He testified that the biggest problem he has with inexperienced employees is getting them to work on a ladder, and he explained the difficulties in that regard.

During this same time period Respondent also had three other applicants for employment who were not hired. Applicant Jack Murphy indicated on his application that he had guttering experience, but he was not hired. Respondent offered no explanation why it failed to hire Murphy when it was seeking experienced gutter installers at the time. Applicant Donald Sumpter's application does not reveal that he had any gutter installation experience; he was not hired. Finally, applicant Jason McKinney's application is dated April 25, the day Brooking was fired. The application indicates that he was referred to Respondent for employment by Brooking; McKinney was not hired. Lane did not consider these individuals for vacancies that occurred thereafter.

C. Brooking is Hired and then Fired

Like the four applicants, Brooking was a union apprentice who had completed the classroom training portion of the program and was involved in the "Youth to Youth Program." Someone at the union office brought Respondent's advertisement to his attention, and he called and arranged for an interview. Unlike the four applicants, Brooking did not wear any clothing that identified him as a union supporter when he appeared for the interview on April 5. Specifically, he did not wear the caps described above, that the four applicants had worn. Like the four applicants, Brooking filled out an application. However, he did not identify himself as being employed by the Union or otherwise indicate that he was a union supporter. Instead, he incorrectly indicated on the application that he worked for a fictitious employer. He testified that he did this because he knew that the four applicants had revealed their union sympathies and not been hired; he was fearful that if he did the same he also would not be hired. On the application Brooking indicated that he had worked for the fictitious employer for about 3-1/2 years in the position of "gutter installer." In fact, Brooking did have experience installing gutters although not with the fictitious employer named on the application. During the interview, Lane asked Brooking about his work experience and Brooking replied that he had 3 years' experience. Lane asked whether Brooking had ever hung gutters and done siding work; Brooking answered that he had. Lane also asked Brooking questions concerning putting flashings around flues and chimneys. Lane then told Brooking that he was hired and could start working the following Monday. Thus, a summary of the facts at this point shows that Respondent advertised for experienced gutter and siding installers; the four applicants who did

not have such experience or did not disclose that experience but who did note their union sympathies on their employment application were not hired. The fifth applicant who did have the experience but who did not reveal his union sympathies on his application was hired.

Brooking began work for Respondent on Monday, April 10. Later that day Lane told Brooking that he had done a good job. On about April 19, Lane told Brooking that Brooking would be receiving a 50-cent-per-hour raise and that Brooking would be placed in a leadman position. Both Lane and Bowman commented that Brooking was doing a good job.

On April 25, Brooking asked to speak with Lane and Bowman, and they met in the shop. Brooking announced that he was a union "Youth-to-Youth" organizer. He assured them that he would confine his organizing efforts to before and after work and during lunchtime. Brooking was wearing a union cap at the time. Lane simply said okay, and the conversation ended. Brooking then began to talk with employees to schedule a meeting at his house so the employees could talk about the Union, and such meetings were held. Thereafter, at least two employees complained to Lane that Brooking was talking to them about a union.[6]

On Monday, May 1, Brooking was sick with what he felt was a chest infection. At about 6:30 a.m. Brooking called Lane and told him that he was not going to be at work that day due to his illness. Lane replied that he really needed Brooking to work that day; that Brooking's absence would really slow him down. Brooking answered that he understood, but that feeling as he did, he would not be any "good" for Lane and would not be able to make any money. Lane, sounding disappointed but not angry, said okay. Brooking said that he would go to the doctor and bring back a doctor's excuse.

The next day Brooking arrived at work and began loading his tools in the truck. Lane approached Brooking and said that he needed to talk to Brooking. Lane pointed to a car and both got in the car and Lane drove toward a subdevelopment that was being constructed in a cornfield. Lane stopped in the cornfield and asked Brooking if he had been talking to the employees. Brooking asked what he meant. Lane replied by asking if there was anything that Brooking needed to tell Lane. Lane continued, saying that things had been getting back to him from his employees and Lane wanted to know if there was anything Brooking should tell him. Lane finally explained that it had been getting back to him that Brooking was trying to convince his workers to be union. Brooking admitted that this was true. Brooking replied that the Union would probably break his company financially and that he wanted strict control over his employees, to hire and fire whomever he wanted whenever he wanted. Brooking said that he had told Lane the Tuesday before that he had been a union organizer and that was what he was there to do. Lane said that he did not understand what Brooking was saying that morning. Lane said that he needed long term help and wanted control and that he was sorry that he had to let Brooking go because Brooking did good work and made a good lead man. Brooking said that he could work a little longer if Lane would let the employees become union. Lane then drove them back to the shop. They then shook hands and Brooking said that if Lane ever needed help he should call Brooking; that Brooking appreciated working with him. At some point before he was fired, Brooking gave Lane a doctor's note that was dated May 1. The note indicated that Brooking had visited an immediate care center on that date and was diagnosed

[6] I accept Lane's unrebutted testimony that these conversations occurred; I do not credit his testimony that they occurred before April 25 when Brooking announced his union sympathies to Lane. Rather, I credit Brooking's testimony that he did not begin his organizing efforts until after his announcement on April 25.

with "acute bronchitis."[7]

A provision in Respondent's personnel manual reads as follows.

> ABSENTEEISM
>
> Employees are expected to call into the office personally and before the normal start time if they are going to be absent. Messages called or sent by anyone other than employee are not acceptable. Failing to notify the office by your start time may result in the employee being considered to have resigned. Doctors certificates may be required from employees who are absent more than the office considers normal. In case of doctors appointments, court appearances, etc. prior approval must be obtained from your manager no less than one week before the date you need off. In any event, any employee off due to illness more than three consecutive days will not be allowed to return to work without a doctors approval.

D. Respondent's Hiring Pattern

At some point during the period April 9 to 16, Respondent hired employee Bradley Woods as a helper; Woods had no prior gutter installation experience.[8] Sometime during the period from May 14 to July 1, Respondent hired employee James Allard as a gutter installer. Allard had prior gutter installation experience and had worked for Respondent in the past. Between the period July 15 and 29, Respondent hired employee Tim Martin as a gutter installer. Martin had also worked for Respondent in the past. Between the period August 12 and 19, Respondent hired employee David Winings as a helper; Winings had no prior gutter experience. Between February 10, and 17, 1996, Respondent hired employee Thomas Oden; the record does not reveal what position Oden was hired into. Between March 16 and 23,

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[7] These facts are based on the testimony of Brooking, who I conclude is a credible witness. I have considered Lane's testimony that Brooking was not fired but that instead he quit his employment with Respondent. Lane explained that Brooking worked for about 2 to 3 weeks and then did not appear for work for 2 days - Saturday and Monday - and he did not call in. On the third day Brooking showed up and announced that he was quitting, gathered his tools, and left. Yet Respondent presented no corroborating or documentary evidence to show that Brooking had been scheduled to work that Saturday. Moreover, later Lane testified that Brooking did not merely ask for his tools and leave on April 25. Instead, after Brooking testified concerning the "cornfield" conversation, Lane admitted that they had, in fact, ridden together in a car and talked in the cornfield an April 25. While Lane admitted that Brooking's performance had been acceptable, he testified that he "probably" would not have continued to permit Brooking to work for him if Brooking had not quit because of Brooking's failure to appear for work or call in for the 2 days. Yet Lane earlier had testified that he did not intend to fire Brooking when Brooking appeared for work on April 25. These inconsistencies, along with an assessment of the witnesses' demeanor, leads me to conclude that Lane's testimony is less credible than Brooking's concerning these events.

[8] I reject Lane's testimony that Woods was hired as a favor to a friend. This hearsay testimony is uncorroborated and lacks the details needed to make it credible.

Respondent hired employees Jeremy Acton and Lester Lecompte. Lecompte was experienced and was hired as a gutter installer; Acton was inexperienced and was hired as a helper. Between April 7, and 13, 1996, Respondent hired employees Brian Topsy, Paul Holman, and Greg Huddleson. Huddleson and Holman were experienced and were hired as gutter installers; Topsy was inexperienced and was hired as a helper. Lane admitted that he did not consider any of the four applicants for these positions. Lane further admitted that had they called back after their interviews and indicated a continuing interest in employment, he would have considered hiring them when a position became available.

III. Analysis

A. The Legal Standard

The analysis set forth in *Wright Line*[9] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire the alleged discriminatees. The Board has restated that analysis as follows:

> Under Wright Line, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7/] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8/] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9/]
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> [7/] NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).
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> [8/] See GSX Corp. v. NLRB, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")
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> [9/] See Aero Metal Forms, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in Manno Electric, 321 NLRB 278 (1996).

B. The Failure to Hire the Four Applicants

Applying that standard to the General Counsel's allegation that Respondent unlawfully refused to hire the four applicants, it is clear that each of the applicant's was a union supporter

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

who noted that fact on their employment applications and wore union caps as a further demonstration of their union support. Lane testified that he did not realize that the four applicants were union adherents until he was served with the unfair labor practice charge in this case; that he did not notice the references on all four applications to the Union and that he did not notice that all four were wearing "union" caps. Lane did admit that when Brooking announced his union sympathies on April 25, he did notice on that occasion that Brooking was wearing a union cap. At first blush, Lane's testimony that he did not realize the union affiliation of the four applicants seems patently incredible. However, there is substantial evidence from the General Counsel's own witnesses that supports the conclusion that Lane did not realize that he had dealt with any union supporters until sometime during the days shortly before Brooking was fired. First, there is no evidence that Lane made any unlawful statements on April 5. Indeed, Lane gave no verbal or other indication at that time that he realized that the four applicants were union supporters. To the contrary, as applicant Moore indicated, Lane was "very pleasant" to the applicants and rather innocently indicated to Moore that he was surprised at suddenly having so many applicants that day. Moreover, when Lane was later told by Brooking that Brooking was an organizer, Lane's only response was a tepid "okay." None of this is consistent with the General Counsel's theory that Lane harbored union animus, nor can it be explained by an argument that Lane was sophisticated enough in the field of labor relations to have kept his union hostility to himself; my observation of his demeanor as well as the inherent probabilities convinces me that such is not the case. Most telling, however, is the testimony of Brooking that when Brooking was fired on May 2, unlawfully as I conclude below, he reminds Lane that he had earlier announced that he was a union organizer and Lane replied *at that time* that he had not realized what Brooking was saying. Thus, this notion was not concocted by Lane on the eve of trial; it was voiced by him near the time in question and by an individual who certainly lacked the sophistication in labor relations to create a story at that time. Although the facts do present a close question, I am guided by the notion that the General Counsel bears the burden of persuasion and I conclude that he has failed on this point.

Even assuming that I were to conclude that Lane in fact was aware of the four applicants' union support, I note that there is no evidence of expressed antiunion hostility before or on April 5. In fact, the first evidence of such hostility appears on May 2.

Finally, the evidence clearly shows that the advertisement placed by Respondent sought "experienced" gutter or siding installers, and I have concluded above that the four applicants either lacked such experience or failed to disclose that experience to Respondent. Thus, the four applicants did not have the requisite qualifications for the position that Respondent was seeking. The General Counsel, in his brief, argues that Wright had such experience. However, I have concluded above that he failed to disclose that experience to Lane. The General Counsel argues that Williams also had gutter installation experience; however, it is clear that Williams was never employed as a gutter installer and his experience was limited to helping other family members put up guttering. This is hardly the type of experience one normally seeks in these circumstances nor would it result in the high degree of speed and proficiency that Respondent was seeking at that time. The General Counsel next points out that all the applicants had classroom training in gutter installation; however, none of the four applicants advised Lane of this fact, either on the face of the application or during their interview. The General Counsel argues that even though the applicants did not have gutter installation experience, their training and experience as sheet metal workers gave them enough experience that they could have easily learned guttering. That certainly appears to be the case, however, that is also irrelevant, since Respondent may nondiscriminatorily set its own hiring standards and may lawfully seek to hire only experienced, and not easily trainable, employees.

I have also considered the General Counsel's argument that in fact Respondent was not

limiting its hiring on April 5 to experienced employees. In this regard, the General Counsel points to the fact that sometime after April 5, but between April 9 and 16, Respondent did hire one inexperienced person as a helper. However, this evidence while sufficient to give weight to the General Counsel's argument, is ultimately insufficient to establish that Respondent was seeking inexperienced employees 4 to 11 days earlier when Lane interviewed the four applicants who were responding specifically to the advertisement for experienced employees. More to the point is the fact that on the day after the four applicants applied, another inexperienced applicant applied - Sumpter - and he too was not hired.

As noted, the General Counsel also argues that Respondent violated the Act by failing to hire the four applicants at various times after their initial rejection by Respondent. However, the General Counsel has failed to show that Respondent has a practice of reconsidering employees for hire after their initial rejection. Lane testified that this was not Respondent's practice, and this general testimony is supported by the fact that three[10] other employees made application to Respondent in April and they were not hired then *or thereafter.* The General Counsel presented no evidence to rebut this testimony. Indeed, in his brief, the General Counsel does not even make the argument that Respondent had such a practice. In the absence of such a practice, Respondent was under no obligation to reconsider the four applicants merely because they were supporters of the Union.

Under all the circumstances, I conclude that the General Counsel has failed to meet his initial burden under *Wright Line.*

Assuming arguendo that the evidence showed that the General Counsel had met his initial burden, I nonetheless would conclude that Respondent has shown that it would not have hired the applicants even absent their display of support for the Union. Respondent contends that the applicants were not hired by Respondent because in their employment applications and during their interviews it became apparent that the applicants lacked experience in gutter installation. In support of this argument is the fact that on April 6 applicant Sumpter, who displayed no union sympathies in his application, also applied for a position, but he did not have gutter installation experience; he was not hired. Because I have found, based on the advertisement and Lane's testimony, that Respondent was only seeking experienced gutter installers on April 5, and that it did not have a practice of calling applicants after they had been initially rejected for employment, I conclude that Respondent has established that it would not have hired the four applicants even absent their union support.

Finally, in his brief the General Counsel relies on *Flour Daniel, Inc.*, 304 NLRB 970 (1991). However, that case is distinguishable. There the Board concluded that the union applicants were qualified for the positions that the employer was seeking. Here, I have concluded that Respondent sought experienced employees and the four applicants failed in that regard. In that case the union applicants listed experience and other factors on their applications which the Board concluded should have lead the employer to conduct further inquiry of the applicants. Here, no such facts come in to play. To the contrary, at least employee Wright decided not to list his gutter experience on his application. Finally, in that case the employer offered pretextual reasons concerning its failure to hire any of the union applicants; no such argument can be successfully made in this case. Accordingly, I shall

[10] I recognize that one of these applicants listed Brooking as a reference and thus this may serve as a reason why that applicant was not called for employment thereafter. The General Counsel, however, does not make that argument.

dismiss this allegation of the complaint.[11]

C. The 8(a)(1) Allegations

The General Counsel contends that Respondent unlawfully interrogated Brooking on May 2, citing *Emery Worldwide,* 309 NLRB 186 (1992). During that conversation Lane asked Brooking if Brooking had been talking to the employees and whether there was anything that Brooking needed to tell Lane. In context, the questions were obviously directed towards Brooking's union activity during the preceding days. I examine the totality of circumstances to determine whether such questioning violated the Act. *Rossmore House,* 269 NLRB 1176 (1984); and *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985). On the one hand Brooking was by the time of the questioning an open union adherent; he was also a paid union organizer. On the other hand, the questioning was done by Respondent's highest official and it was repetitive in nature. The questioning was not simply directed towards Brooking's views toward unions; it was directed at Brooking's interaction with other employees designed to unionize Respondent. The questioning occurred in the middle of a cornfield where Brooking had been driven by Lane. Finally, the questioning was a prelude for the conclusion of the conversation where Brooking was fired. These circumstances tend to strengthen the coercive nature of the questioning and outweigh its noncoercive aspects. Accordingly, I conclude that Respondent violated Section 8(a)(1) by coercively interrogating Brooking on May 2.

The General Counsel next contends that Respondent unlawfully created the impression that it had engaged in surveillance of its employees' union activities, citing *T & J Trucking, Co.*, supra. During the conversation, Lane told Brooking that "it had been getting back" to Lane that Brooking had been trying to convince his workers to join the Union. It is important to note that Lane did not reveal the source of his information nor explain to Brooking how that information was obtained by Lane or others. Under these circumstances an employee could reasonably conclude that Lane obtained the information by engaging in surveillance of Brooking's and other employees' union activity. Accordingly, I conclude that Respondent violated Section 8(a)(1) by giving Brooking the impression that Respondent had engaged in surveillance of his and other employees' union activity.

Finally, the General Counsel alleges that Respondent unlawfully impliedly threatened employees with discharge for engaging in union activity. The General Counsel points to Lane's statement that he did not want a union because he wanted to retain strict control to hire and fire employees whenever he wanted. The General Counsel does not cite case authority to support his argument that such as statement is unlawful. I do not read any implied threat of discharge related to union activities in Lane's statement. Of course, unions frequently negotiate collective-bargaining agreements that do restrict an employer's right to hire and fire at will. Lane's statement appears to be nothing more than a recitation of a reason why he does not desire his employees to be represented by a union. Under these circumstances, I shall dismiss this allegation in the complaint.

D. Brooking's Discharge

The complaint alleges that Brooking was unlawfully discharged. Applying the *Wright Line* analysis, it is clear that Brooking was a union supporter. The evidence also shows that

[11] The complaint also alleges that Respondent failed to consider the applicants for hire. In his brief the General Counsel makes no specific argument in this regard. In light of my findings above, I have also effectively concluded that this allegation also lacks merit.

Respondent knew this when Brooking announced his union support to Lane on April 25, and more importantly, when thereafter employees complained to Lane that Brooking had been trying to persuade them to join the Union. In fact, during the May 2 meeting Lane disclosed that he knew that Brooking had been engaging in union activity. Also, the facts showed that Respondent was hostile towards Brooking's union activity; during the May 2 encounter Lane unlawfully interrogated Brooking and unlawfully gave the impression of surveillance of union activity. Lane directly indicated to Brooking that he opposed the unionization of his employees, and the end of the very same conversation discharged Brooking. These facts establish that the General Counsel has met his initial burden of showing an unlawful discharge.

I turn now to examine whether Respondent has met its burden of showing that it would have discharged Brooking even if he had not engaged in union activity. Clearly it has not done so. As set forth above, Respondent has asserted that Brooking was not fired but instead quit, but I have not credited that testimony. Lane at one point admitted that Brooking was a good employee and that he had not intended to fire Brooking, but at another point Lane claimed that he probably would not have continued to employ Brooking because he was absent 2 consecutive days. Such shifting testimony only serves to strengthen the General Counsel's case. In any event, I have concluded that Brooking was not, in fact, absent from work for 2 consecutive days; and even if he had been, Respondent's own rules do not show that he would been fired. Finally, Brooking produced a doctor's note to justify his 1-day absence. I therefore conclude that Respondent violated Section 8(a)(3) and (1) by discharging Brooking on May 2.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively interrogating an employee concerning his union activity and giving the impression that it had engaged in surveillance of the union activity of its employees.

4. By discharging employee Gabriel Brooking on May 2, 1995, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Brooking, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, L & B Construction Co. Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activity or giving employees the impression that their union activity is under surveillance.

(b) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gabriel Brooking full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Brooking whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Danville, Indiana, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS

Continued

provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 19, 1998

_____
William G. Kocol
Administrative Law Judge

_____
BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NO. 20, a/w SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION or any other union.

WE WILL NOT coercively question you about your union support or activities or give you the impression that we are engaging in surveillance of your union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gabriel Brooking full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gabriel Brooking whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gabriel Brooking, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

L & B CONSTRUCTION CO. INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204–1577, Telephone 317–226–7413.